Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1117

RICHARD J. WIDELSKI and MARY C. WIDELSKI,
Petitioners,

v.

UNITED STATES OF AMERICA AND BRUCE B. MACK, REVENUE AGENT, INTERNAL REVENUE SERVICE,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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UNITED STATES OF AMERICA AND BRUCE B. MACK, REVENUE AGENT, INTERNAL REVENUE SERVICE,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Richard J. Widelski and Mary C. Widelski, the petitioners herein, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above cause on December 17, 1971.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reprinted in Appendix A, but as yet, is neither officially nor unofficially reported. The order of the Court of Appeals denying a Petition for Rehearing is reprinted in Appendix B.

The opinion of the District Court for the Eastern District of Michigan is reprinted in Appendix C and while not yet officially reported, it is unofficially reported in 26 Am. Fed. Tax. R. 2d ¶ 70-5201. The order of the District Court denying a Motion to Amend and Supplement Findings of Fact, Conclusions of Law and Judgment is reprinted in Appendix D.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on December 17, 1971. The Court of Appeals stayed its mandate on February 7, 1972, pending the filing of a petition for a writ of certiorari and a final determination thereon by this Court. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. On the date an administrative summons is served, is possession, whether such be personal and indefinite or not, of the desired records, a sufficient basis to claim that they are within the privilege against self-incrimination and do not have to be surrendered?

2. Can the protection of the Fourth Amendment of the Federal Constitution be denied taxpayers on the basis that the possibility of criminal prosecution appears to be remote, but in the event it should ensue, the taxpayers could avail themselves of any available Fifth Amendment defenses?

3. Can the Government's burden of proof in a summons enforcement case be ignored by the lower courts once it has been placed in issue?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions involved are the unreasonable search and seizure provision of the Fourth Amendment and the self-incrimination clause of the Fifth Amendment to the United States Constitution. The statute pertaining to the authority of the Secretary of the Treasury to issue summonses is the Internal Revenue Code of 1954, Sec. 7602, 26 U.S.C. §7602. The statute giving the District Court power to compel the submission of records pursuant to an administrative summons is the Internal Revenue Code of 1954, Sec. 7604, 26 U.S.C., §7604.

STATEMENT OF THE CASE

This suit was instituted for the enforcement of an administrative summons which had been issued and served by an authorized agent of the Internal Revenue Service upon the petitioners-taxpayers. The copy of each of the taxpayers' Federal Income Tax Returns for the years 1949 through 1959 inclusive, which were in the taxpayers' possession, was to be produced pursuant to the summons. Nothing more was to be produced.

The copy of the returns for the years 1949 through 1959 came into thetaxpayers' possession on February 10, 1968 which was: (1) at least five months after the identity of their bookkeeper, who had prepared the returns, had been established by the Internal Revenue Service (R. 93-94); (2) approximately three months after an agent had audited the taxpayers' books and records with respect to 1964, 1965 and 1966; (R. 62); (3) approximately two months after a Special Agent of the Intelligence Division of the Internal Revenue Service had been assigned to investigate the years 1963 through 1966 (R. 62-63 and 76); (4) seven to eight months before any agent of the Internal Revenue Service even became interested in the taxpayers' financial affairs for years prior to 1960 (R. 83 and 94); (5) approximately fifteen months before the summons in question was served (R. 94-95), and (6) prior to the time any agent ever indicated even an interest in, much less made a request for the copy of the 1949 through 1959 Federal income tax returns. (Entire Record). Prior to February 10, 1968, the taxpayers' bookkeeper had held the copy of the various returns for security purposes pursuant to the

arrangement entered into by the parties in 1949 when the bookkeeper was initially engaged (R. 99)

Approximately three months after the transfer, the Internal Revenue Service prepared a net worth computation with respect to the taxpayers for the years 1960 through 1966. The computation reflected ostensible, substantial understatements of income which warranted the assertion of the fraud penalty for those years pursuant to 26 U.S.C. §6653(b). (R. 66, 68 and 83). After the passage of another five months, another net worth computation was made and it covered the years 1953 through 1966. (R. 45 and 83).

While the Intelligence Division apparently dropped its portion of the case in January 1969, the Special Agent remained active in the case and in fact questioned the taxpayers when they appeared, pursuant to the summons, on June 19, 1969. (R. 62, 76, 77, 79 and 84).

The summons enforcement case was instituted in the Eastern District of Michigan and the taxpayers raised two principal defenses, viz., (1) the Government could not sustain its burden of proof, and (2) compliance with the summons would violate the taxpayers' constitutional rights afforded them by the Fourth and Fifth Amendments to the Federal Constitution (R. 51-53).

On June 30, 1970, a hearing was held. During the hearing the bookkeeper testified that after he transferred the copy of the various returns to the taxpayers, he did *not:* (1) know whether they would ever be returned to him; (R. 101), (2) begrudge returning them since he viewed them as the taxpayers' property (R. 95 and 100-101); rather, he was glad to give them to the taxpayers since he was vacating his business premises (R. 101), and (3) feel he was in a position to demand to see them and in fact felt that it

was up to the taxpayers as to whether they would even show them to him again (R. 100).

Nevertheless, the District Court ordered the enforcement of the summons. In its opinion, the District Court concluded that the enforcement order would not

> "... trangress the taxpayers' Fifth Amendment rights since the frantic last minute efforts on their part to put the requested returns beyond the reach of the Government did not have the effect of transfering rightful possession of Mr. Kustryk's records to them" (R. 22-23).

At the same time, the District Court did not pass upon the burden of proof or Fourth Amendment arguments advanced by the taxpayers. Additionally, the District Court's eighth finding of fact was with respect to the point that the Government does not have any copies of the taxpayers' returns for the years 1949 through 1959. There was no finding of fact as to whether the Government had the original of each of those returns.

In affirming the lower court's decision, the Court of Appeals held, but by inference only, that compliance with the summons would not be in violation of the taxpayers' rights under the Fourth and Fifth Amendments. The Court did declare however that the finding of the District Court, on the question of whether the Government had proven the unavailability of the original tax returns, was not clearly erroneous. However, there was no finding by the District Court on the point. No further statement was made by the Court of Appeals on the "burden of proof" issue.

On passing upon the nature of the taxpayers' possession, the Court focused its attention on the date of the transfer, as opposed to the date the summons was served.

The Court also noted the taxpayers reliance upon the case of *United States* v. *Cohen*, 388 F. 2d 464 (9th Cir. 1967). In discussing that case, the Court declared that it was against the weight of authority and would not be followed to the extent that it was inconsistent with the views expressed in its decision.

REASONS FOR GRANTING THE WRIT

I

The decision below should be reviewed since by its very terms it is in conflict with the decision rendered by the Court of Appeals for the Ninth Circuit in the case of *United States* v. *Cohen, supra.* In deciding this case, the Court of Appeals for the Sixth Circuit noted the taxpayers' reliance upon the *Cohen* case and then declared that:

> "the Ninth Circuit view set forth in *Cohen* is against the weight of authority. E.g., *United States* v. *Couch*, No. 14,546, .. F.2d .. (4th Cir. Oct. 12, 1971); *United States* v. *Egenberg*, 443 F. 2d 512 (3rd Cir. 1971); *United States* v. *Zakutansky, supra*, 401 F. 2d 68 (7th Cir. 1968). To the extent that it may be inconsistent with the views expressed herein, we respectfully decline to follow it."

Since in this case, as in the *Cohen* case, the taxpayers were in possession of the desired records, with, at the very least, the full consent of the "owner" thereof, had the matter been heard by the Ninth Circuit, it would have been decided in the taxpayers' favor. A clear conflict between the Circuits thus exists and should be resolved.

In the preceding paragraph, the word "owner" was placed in quotes since the District Court's conclusion, to the effect

that the bookkeeper in this case owned the copy of the various returns, is clearly erroneous. The error is demonstrated by the totally uncontradicted testimony of the bookkeeper to the effect that it was agreed in 1949 that the taxpayers would be the owners of the copy of the return to be retained by him (R. 99-101). Additionally, the application of the "clearly erroneous" standard to that conclusion by the Court of Appeals was in error since the resolution of the ownership question represents a conclusion as opposed to a finding of fact by the District Court. *See: In re Grant,* 198 F. 708 (S.D. N.Y. 1912) aff'd. 227 U.S. 74 (1913).

Furthermore, the Court of Appeals clearly erred when it, as in the case of the District Court, failed to find that the taxpayers' possession was both personal and indefinite (R. 100-101). In refusing to so find the Court found that the transfer occurred ". . . no more than ten days after they (the taxpayers) had disclosed the identity of their accountant." The identity of the bookkeeper had been established, and, in fact, he had been contacted by the Internal Revenue Service in connection with the taxpayers' returns for the years then under investigation, that is, 1964 through 1966, five months prior to the transfer of the copy of the returns for the years *1949 through 1959* (R. 62 and 93-94).

II

The conflict which this decision clearly creates demonstrates the importance for a review thereof by this Court. Furthermore, in deciding the case, the Court of Appeals made several pronouncements which are in conflict with established principles applicable to summons enforcement cases. The net effect of those pronouncements will be a lessening of the ability of all taxpayer-citizens to resist

summons enforcement cases which in turn could result in infringements upon their constitutional rights. For that reason as well then, the decision should be reviewed.

The pronouncements in question begin with the declaration that: "Work papers of an accountant are his property unless the contrary is shown." While authorities were cited for that proposition, they do not support it. Rather, they establish that no such presumption exists and that the issue of ownership must be decided on a case by case basis upon such evidence as, but not limited to, property rights contractually granted by a bookkeeper to a client, as occurred in this case, or such rights given to certified public accountants by state law. Then, the Court of Appeals by implication stated that copies of tax returns are part of an accountant's workpapers. Such is not the case. *United States* v. *Zakutansky, supra.*

Next, by framing the question for decision as it did, the Court of Appeals by implication ruled that a taxpayer would never be able to demonstrate a proprietary interest in records not in his possession, so as to allow him to intervene in a summons case instituted against a third party possessor. *Donoldson* v. *United States,* 400 U.S. 517 (1971). If the evidence of record in this case does not prove a proprietary interest then no taxpayer will ever be able to prove one where a third party has "nominal" possession.

Furthermore, the Court focused its attention on the date of the transfer of the records in passing upon the nature of the taxpayers' possession. The principle that the critical date, in cases such as this, is the date the summons is served was established in *United States* v. *Zakutansky, supra,* and *Deck* v. *United States,* 339 F.2d 739 (D.C. Cir. 1964) cert. denied, 379 U.S. 967 (1965). While the principle

was also recognized by the Court of Appeals for the Sixth Circuit in the case of *United States* v. *Held*, 435 F.2d 1361 (1970), apparently, it either chose to disregard it in this case or it simply rejected the principle.

III

A review of the decision is also warranted by the fact that the Court of Appeals suggested a new standard to be applied when the privilege against self-incrimination has been raised in a case. Apparently, as justification for its decision, the Court stated that:

> "the possibility of any criminal prosecution of the taxpayers would appear to be remote. Nothing in this opinion is intended to affect the right of taxpayers to avail themselves of any Fifth Amendment defense that otherwise might be available in event of a criminal prosecution."

While the proposed standard conforms to the approach adopted by the Court of Appeals for the Sixth Circuit in cases such as this, as exemplified by its decision in the case of *Hinchcliff* v. *Clarke*, 371 F. 2d 697 (6th Cir. 1967), cert. denied 387 U.S. 941 (1967), it nevertheless is objectionable since it is in conflict with the standard as established by this Court. *Malloy* v. *Hogan*, 378 U.S. 1 (1964) and *Hoffman* v. *United States*, 341 U.S. 479 (1951). Furthermore, it overlooks and is, therefore, in conflict with, the principle that the protection of the Fourth Amendment, when coupled with the privilege against self-incrimination, extends to the production of desired records. *Boyd* v. *United States*, 116 U.S. 616, 635 (1886) and *VIII Wigmore, Evidence*, §2264, at 379-80 (McNaughton rev. 1961).

IV

Finally, the decision should be reviewed in light of the implicit rejection by the two lower courts of the principle that when the Government's burden of proof in summons enforcement cases has been placed in issue by taxpayers, it is mandatory as a jurisdictional matter to decide whether the Government has sustained its burden of proof. *McNutt v. General Motors Acceptance Corporation,* 298 U.S. 178 (1936).

The Government's burden in cases such as this was set forth by this Court in the case of *United States* v. *Powell,* 379 U.S. 48, 57-58 (1964). Additionally, in the cases of *United States* v. *Pritchard, Jr.,* .. F. Supp. .., 25 Am. Fed. Tax R. 2d 70-1354, aff'd 438 F.2d 969 (5th Cir. 1971) and *United States* v. *Levy,* 270 F. Supp. 601 (D.C. Conn. 1967), the Government's petitions to enforce Internal Revenue Service summonses were dismissed on the ground that the Government had failed to sustain its burden of proof.

In this case, the District Court failed to make any findings on whether all of the required administrative steps in connection with the issuance of a summons had been followed and on whether the original of the desired returns was in the Government's possession. Findings on the last point were required in order to hold that the information sought by the Government was not already in its possession. This failure by the District Court occurred even though the issue had been raised by the taxpayers. In point of fact, the failure occurred since, in light of the record of this case, such findings could not have been made.

In reviewing the case, the Court of Appeals clearly erred when it too ignored the need to decide whether the Gov-

ernment had sustained its burden even though it was again placed in issue by the taxpayers. It further erred, as noted previously, when it found that the District Court's finding on the point of the availability of the original tax returns was not clearly erroneous since no such finding had been made by the lower court.

If the judicial review of cases such as this is to be meaningful; if the granting of a preferred status to the Government in civil cases such as this is to be avoided, and if all taxpayers are to be protected from the arbitrary institution of summons cases against them, this Court must decree, or at least emphasize, that the lower courts cannot ignore the "burden of proof" issue when raised by taxpayers and, if the Government should fail to sustain it in a given case, it should be dismissed since all summons enforcement cases are adversary proceedings and must be handled accordingly. See *Reisman* v. *Caplin,* 375 U.S. 440 (1964). For those reasons as well, the decision should be reviewed by this Court.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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APPENDIX A.

OPINION OF THE COURT OF APPEALS.

No. 71-1089

UNITED STATES COURT OF APPEALS
for the Sixth Circuit

UNITED STATES OF AMERICA AND BRUCE B. MACK, REVENUE AGENT, INTERNAL REVENUE SERVICE,
Petitioners-Appellees,

v.

RICHARD J. WIDELSKI AND MARY C. WIDELSKI,
Respondents-Appellants.

APPEAL from the United States District Court for the Eastern District of Michigan, Southern Division.

Decided and Filed December 17, 1971

Before, PHILLIPS, Chief Judge, and WEICK and EDWARDS, Circuit Judges.

PHILLIPS, Chief Judge. An accountant prepared income tax returns for the taxpayers for the years 1949-59. The original and a carbon copy of each return were transmitted to the taxpayers at the appropriate time for signing and filing. The accountant retained for his files a carbon copy of each tax return and the related work papers. The accountant's copy of the returns were transferred by him to the taxpayers at their request after a tax investigation had begun.

This is an appeal from a District Court order granting judicial enforcement of an Internal Revenue Service administrative summons directing the taxpayers to produce these copies of their income tax returns for 1949-59.

We affirm.

The pertinent facts were summarized as follows in the findings of fact and conclusions of law of District Judge Talbot Smith:

"Findings of Fact

"1. In November of 1967, Mr. Stephen Jarosz, then a revenue agent of the Audit Division of the Internal Revenue Service, was assigned to investigate the income tax liabilities of Richard J. Widelski and Mary C. Widelski for the years 1960 through 1966, for which the Government has available their income tax returns. There is, however, no return available for 1962 although the Government admits that it was filed. As part of his investigation, Mr. Jarosz determined that the amount of dividends, interest and investments, as reported in the taxpayers' income tax returns was too high for Mr. Widelski's income bracket. This indicated a possibility of fraud and Mr. Jarosz, as is his duty in such situations, referred the case for a 'joint' investigation.

"2. Thus in December of 1967, special agent Charles Fillmore of the Intelligence Division was also assigned to the investigation. Special Agent Fillmore's first contact with the taxpayers was made on January 31, 1968, at which time Mr. Widelski stated to Agents Jarosz and Fillmore that a Mr. Ted Kustryk had been their accountant or book-

keeper since 1949 and had prepared all of their income tax returns for the years 1949 through 1959, inclusive.

"3. Immediately thereafter, Agent Fillmore contacted Mr. Kustryk and arranged an appointment for February 8, 1968. However, Mr. Kustryk adjourned that appointment, rescheduling it for February 12, 1968, at which time he said that he had been the Widelski's bookkeeper since 1949 but that he no longer had any copies of tax returns or work papers pertaining to them since Mr. Widelski, on February 9, 1968, had directed him to turn over the copies of returns and work papers in his possession to them. On February 10, 1968, Mr. Kustryk turned over these records, which consisted of his retained copies of all tax returns and work papers of the taxpayers' business as far back as 1949.

"4. Mr. Kustryk, on February 12, March 29, and May 3, 1968, informed one or both of the agents that he had prepared an income tax return and two copies thereof for each year, the original and a copy of which he mailed to Mr. Widelski, keeping one copy for his files attached to the related work papers. The copy of the Federal income tax returns for the years 1949 through 1959 and the work papers relating thereto remained in Mr. Kustryk's continual possession (the oldest work papers and returns for 20 years) until February 10, 1968. The taxpayers had never previously asked for these retained copies. This Court finds that these copies were part of Mr. Kustryk's work papers and remain his property.

"5. Subsequently, in 1968, a net worth computation concerning the taxpayers was prepared by

the agents which showed an ostensible substantial understatement of income for the years 1960 through 1966, warranting the assertion of the civil fraud penalty, 26 U.S.C. § 6653(b). In October of 1968, Mr. Jarosz resigned his position and Mr. James Feaster, then a revenue agent, was assigned to take his place. He reported a net worth computation on the taxpayers for the years 1953 through 1959.

"6. In January, 1969, the Intelligence Division decided to drop its portion of the case which was concerned with possible criminal behavior resulting from an understatement of income.

"7. On May 29, 1968, the summons, issued under 26 U.S.C. § 7602 was duly served personally on the taxpayers by revenue agent Feaster. The summons called for production of

> 'The accountant's or taxpayer's retained copies of Federal Income Tax Returns prepared for Richard J. and Mary C. Widelski jointly, or Richard J. Widelski individually for the years 1949 through 1959 inclusive, which are in your possession or control.'

"8. The Government no longer has in its possession copies of the taxpayers' income tax returns for the years 1949 through 1959, inclusive. Therefore the copies of these returns are necessary to the Internal Revenue Service so that it may compare its findings of net worth of the taxpayers for the years 1949 through 1959 against said returns. These copies are thus essential to the investigation, 26 U.S.C. §§6501(b) and 6653(b).

"9. In December of 1969, Mr. Feaster resigned his position with the Internal Revenue Service. Subsequently, revenue agent Bruce B. Mack, one of

the petitioners, was assigned to the tax investigation."

Following the refusal of the taxpayers to produce the requested returns, the Government commenced this action for enforcement. Taxpayers resisted enforcement, asserting their Fourth and Fifth Amendment rights. After considering the testimony of Internal Revenue Service agents and of Mr. Kustryk, the District Judge found that the documents sought were the property of the accountant. He further concluded that the last minute efforts of the taxpayers to obtain custody of the returns did not give them such rightful possession as to enable them to raise their asserted claims.

Congress has provided a statutory plan by which the Internal Revenue Service is empowered to examine records and witnesses to ascertain tax liability.[1] Compliance

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[1] 26 U.S.C. § 7602:

"Examination of books and witnesses

"For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

"(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

"(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

"(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry."

with the summons can be compelled by the District Court.[2] This power is in the nature of the inquisitorial power of a grand jury and should be liberally construed. *Falsone* v. *United States,* 205 F.2d 734, 742 (5th Cir.), cert denied, 346 U.S. 864 (1953).

Work papers of an accountant are his property unless the contrary is shown. *United States* v. *Zakutansky,* 401 F.2d 68, 70 (7th Cir. 1968), cert. denied, 393 U.S. 1021 (1969); *In re Fahey,* 300 F.2d 383 (6th Cir. 1961); Annot., 90 A.L.R. 2d 784 (1963). The findings of the District Court that the accountant was the owner of the copies prepared by him for retention in his files does not appear to be clearly erroneous. See *Commissioner* v. *Duberstein,* 363 U.S. 278, 291 (1960); R. 52(a), Fed. R. Civ. P.

Had the returns been in the possession of the accountant when the summons was served, he could not have relied upon the taxpayers' privilege against self-incrimination to resist production in an action to enforce the summons. E.g., *Rogers* v. *United States,* 340 U.S. 367, 371 (1951); *Hale* v. *Henkel,* 201 U.S. 43, 69-70 (1906). Further, the lack of a proprietary interest in the copies on the part of the taxpayers or of a recognized privilege[3] between the

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[2] 26 U.S.C. § 7604(a):

"Enforcement of Summons

"(a) Jurisdiction of district court.—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data."

[3] The taxpayers do not assert any accountant-client privilege in this case. The accountant sometimes is referred to in the record as a bookkeeper.

taxpayers and their accountant would have denied the taxpayers the right to intervene in the summons enforcement proceeding. See *Donaldson* v. *United States*, 400 U.S. 517, 530-31 (1971).

Thus the question before us is whether the action of the taxpayers in obtaining the copies prior to service of the summons permits them to raise a privilege that would have been denied to them had the documents remained in the hands of the accountant. We hold that, under the facts of this case, it does not.

At the time of the transfer, the returns had been in the custody of the accountant for periods ranging from nine to nineteen years. At no time prior to the transfer had the taxpayers shown any interest in securing the copies. It was only after Internal Revenue Service agents sought an interview with the accountant that taxpayers requested transfer of the returns to them. See *United States* v. *Zakutansky, supra*, 401 F.2d at 72; *Deck* v. *United States*, 339 F.2d 739, 740 (D.C. Cir. 1964), cert. denied, 379 U.S. 967 (1965).

Taxpayers attack the District Court's characterization of the transfer as "frantic last minute efforts on their part to put the requested returns beyond the reach of the Government," pointing to the fifteen month interval between the transfer and the issuance of the summons. Under the facts of this case we find this time interval to be immaterial. The transfer was made at the request of the taxpayers no more than ten days after they had disclosed the identity of their accountant.

Taxpayers assert that, independent of property concepts, they may raise the privilege against self incrimination as to the production of documents which have been turned over to them with the consent of their accountant, relying on *United States* v. *Cohen*, 388 F.2d 464 (9th Cir. 1967). The Ninth Circuit view set forth in *Cohen* is against the

weight of authority. E.g., *United States* v. *Couch,* No. 14,546, .. F.2d .. (4th Cir., Oct. 12, 1971); *United States* v. *Egenberg,* 443 F.2d 512 (3rd Cir. 1971); *United States* v. *Zakutansky, supra,* 401 F.2d 68 (7th Cir. 1968). To the extent that it may be inconsistent with the views expressed herein, we respectfully decline to follow it.

Taxpayers also rely upon *Stuart* v. *United States,* 416 F.2d 459 (5th Cir. 1969), which we find to be distinguishable on its facts. The records in that case belonged to the taxpayers and were delivered to the accountant for the sole purpose of providing a more convenient time and location for conducting the pending investigation.

It is to be emphasized that the District Court in the present case found that the Intelligence Division of the Internal Revenue Service has dropped that portion of the investigation concerned with possible criminal behavior. The case now before us presents an investigation of civil tax liability and perhaps civil fraud penalties. The possibility of any criminal prosecution of the taxpayers would appear to be remote. Nothing in this opinion is intended to affect the right of taxpayers to avail themselves of any Fifth Amendment defense that othewise might be available in event of a criminal prosecution.

The final contention of the taxpayers is that the Government failed to show the unavailability of the original tax returns. We hold that the finding of the District Court on this point is not clearly erroneous. R. 52(a), Fed. R. Civ. P.

Affirmed.

APPENDIX B.

ORDER OF THE COURT OF APPEALS

No. 71-1089

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, ET AL.,
Petitioners-Appellees,
v.
RICHARD J. WIDELSKI, ET AL.,
Respondents-Appellants.

ORDER DENYING PETITION FOR REHEARING

Decided and Filed January 17, 1972

Before PHILLIPS, Chief Judge, and WEICK and EDWARDS, Circuit Judges.

Upon consideration, it is ORDERED that the petition for rehearing be denied.

Entered by order of the court.

/s/ James A. Higgins,
CLERK

APPENDIX C.

OPINION OF THE DISTRICT COURT.

Civil Action No. 34718

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION.

UNITED STATES OF AMERICA AND BRUCE B. MACK, REVENUE AGENT, INTERNAL REVENUE SERVICE,
Petitioners
vs.
RICHARD J. WIDELSKI AND MARY C. WIDELSKI,
Respondents

OPINION OF HONORABLE TALBOT SMITH
ON OCTOBER 22, 1970

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This action, seeking judicial enforcement of a summons issued by a revenue agent of the Internal Revenue Service, having come on for hearing on June 29, 1970, pursuant to the petition and affidavits of the petitioners, and an order of the District Court to show cause, dated April 9, 1970, and upon all of the testimony and evidence submitted at the hearing, the Court now enters the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. In November of 1967, Mr. Stephen Jarosz, then a revenue agent of the Audit Division of the Internal Revenue Service, was assigned to investigate the income tax liabilities of Richard J. Widelski and Mary C. Widelski for the years 1960 through 1966, for which the Government has available their income tax returns. There is, however, no return available for 1962 although the Government admits that it was filed. As part of his investigation, Mr. Jarosz determined that the amount of dividends, interest and investments, as reported in the taxpayers' income tax returns was too high for Mr. Widelski's income bracket. This indicated a possibility of fraud and Mr. Jarosz, as is his duty in such situations, referred the case for a "joint" investigation.

2. Thus in December of 1967, special agent Charles Fillmore of the Intelligence Division was also assigned to the investigation. Special Agent Fillmore's first contact with the taxpayers was made on January 31, 1968, at which time Mr. Widelski stated to Agents Jarosz and Fillmore that a Mr. Ted Kustryk had been their accountant or bookkeeper since 1949 and had prepared all of their income tax returns for the years 1949 through 1959, inclusive.

3. Immediately thereafter, Agent Fillmore contacted Mr. Kustryk and arranged an appointment for February 8, 1968. However, Mr. Kustryk adjourned that appointment, rescheduling it for February 12, 1968, at which time he said that he had been the Widelski's bookkeeper since 1949 but that he no longer had any copies of tax returns or work papers pertaining to them since Mr. Widelski, on February 9, 1968, had directed him to turn over the copies

of returns and work papers in his possession to them. On February 10, 1968, Mr. Kustryk turned over these records, which consisted of his retained copies of all tax returns and work papers of the taxpayers' business as far back as 1949.

4. Mr. Kustryk, on February 12, March 29, and May 3, 1968, informed one or both of the agents that he had prepared an income tax return and two copies thereof for each year, the original and a copy of which he mailed to Mr. Widelski, keeping one copy for his files attached to the related work papers. The copy of the Federal income tax returns for the years 1949 through 1959 and the work papers relating thereto remained in Mr. Kustryk's continual possession (the oldest work papers and returns for 20 years) until February 10, 1968. The taxpayers had never previously asked for these retained copies. This Court finds that these copies were part of Mr. Kustryk's work papers and remain his property.

5. Subsequently, in 1968, a net worth computation concerning the taxpayers was prepared by the agents which showed an ostensible substantial understatement of income for the years 1960 through 1966, warranting the assertion of the civil fraud penalty. 26 U.S.C. §6653 (b). In October of 1968, Mr. Jarosz resigned his position and Mr. James Feaster, then a revenue agent, was assigned to take his place. He reported a net worth computation on the taxpayers for the years 1953 through 1959.

6. In January, 1969, the Intelligence Division decided to drop its portion of the case which was concerned with possible criminal behavior resulting from an understatement of income.

7. On May 29, 1968, the summons, issued under 26 U.S.C. §7602 was duly served personally on the taxpayers

by revenue agent Feaster. The summons called for production of

> "The accountant's or taxpayer's retained copies of Federal Income Tax Returns prepared for Richard J. and Mary C. Widelski jointly, or Richard J. Widelski individually for the years 1949 through 1959 inclusive, which are in your possession or control."

8. The Government no longer has in its possession copies of the taxpayers' income tax returns for the years 1949 through 1959, inclusive. Therefore the copies of these returns are necessary to the Internal Revenue Service so that it may compare its findings of net worth of the taxpayers for the years 1949 through 1959 against said returns. These copies are thus essential to the investigation, 26 U.S.C. §§6501(b) and 6653(b).

9. In December of 1969, Mr. Feaster resigned his position with the Internal Revenue Service. Subsequently, revenue agent Bruce B. Mack, one of the petitioners, was assigned to the tax investigation.

CONCLUSIONS OF LAW

A. The Court has jurisdiction of the parties and of this cause of action pursuant to 26 U.S.C. §7604 (a).

B. The summons here sought to be enforced, issued on May 29, 1969, by Mr. James Feaster, then a revenue agent, is authorized by the provisions of 26 U.S.C. §7602, and is valid and entitled to enforcement. *United States* v. *Powell*, 379 U.S. 48 (1964).

C. As stated in *United States* v. *Baldridge*, 281 F. Supp. 470 (SD Tex., 1968), at p. 473:

> Any transfer of records and work papers after the institution of an income tax investigation should be carefully scrutinized by the courts.

On the basis of the testimony, the Court, despite the assertions of Mr. Kustryk at the hearing, concludes that the copies (of returns) are his property. See *Bouschor* v. *United States*, 316 F.2d 451 (CA 8, 1963); *United States* v. *Boccuto*, 175 F. Supp. 886 (D.N.J., 1959); *Sale* v. *United States*, 228 F.2d 682 (CA 8, 1956), cert. den. 350 U.S. 1006 (1956); *Deck* v. *United States*, 339 F.2d 739 (CA D.C., 1964); and *United States* v. *Zakutansky*, 278 F. Supp. 682 (ND Ind. 1968), in which the courts stated that they did not consider themselves bound by the assertions of the taxpayers (who did not testify in this proceeding), accountants, or both.

D. Enforcement of this summons, requiring the production of copies of federal income tax returns for the years 1949 through 1959, inclusive, does not transgress the taxpayers' Fifth Amendment rights since the frantic last minute efforts on their part to put the requested returns beyond the reach of the Government did not have the effect of transferring rightful possession of Mr. Kustryk's records to them.

In *United States* v. *Zakutansky, supra*, the Court states, at p. 685:

> The "rightful possession" test advanced by some of the courts does not apply here because at the time that the papers were transferred the transferor was under a moral, if not legal, obligation to provide them to the government. Both Mr. Zakutansky and Mr. Johnson [accountant and taxpayer] were aware of this obligation and its possible consequences. Their na-

tural desire to protect themselves or their clients is not sufficient to change the character of the papers and thereby defeat a legitimate Government investigation.

In *Deck* v. *United States, supra,* the Court states, at p. 740:

> It was not until after the tax investigation began that Kless showed any interest in the work papers then in the possession of [accountant] Phillips; until Kless requested them they were kept by Phillips in his office and were apparently regarded by all concerned as his property.

Finally, in *United States* v. *Baldridge, supra,* at p. 473, the Court states:

> It would be clearly erroneous to attribute to these sham transactions the effect of transferring possession since to do so would violate the rule that the power of the Commissioner to investigate the records and affairs of taxpayers must be liberally construed. *Falsone* v. *United States* [53-2 USTC ¶9467], 205 F.2d 734 (5 CA), cert denied 346 U.S. 864 (1953); *United States* v. *McKay* [67-1 USTC ¶12,449], 372 F.2d 174 (5 CA 1967).

E. The Court concludes that enforcement of the summons should be granted and an order will enter accordingly.

APPENDIX D.

ORDER OF THE DISTRICT COURT

Civil Action No. 34718

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA AND BRUCE B. MACK, REVENUE AGENT, INTERNAL REVENUE SERVICE,
Petitioners,
vs.
RICHARD J. WIDELSKI AND MARY C. WIDELSKI,
Respondents.

ORDER

At a session of said Court, held in the Federal Building, City of Detroit, Michigan, on November 12, 1970.

PRESENT: THE HONORABLE TALBOT SMITH
UNITED STATES DISTRICT JUDGE.

Upon consideration of the Motion to Amend and Supplement Findings of Fact, Conclusions of Law and Judgment, and the Brief filed in support thereof, the Court finds that the Findings of Fact and Conclusions of Law originally filed by it are reflective of the Record herein and the law applicable thereto, that the arguments made by Defendants are without merit, and the Motion is therefore denied.

It is so ordered.

/s/ TALBOT SMITH
United States District Judge

APPENDIX E.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Specific Provisions of the Constitutional Amendments Relied Upon:

Fourth Amendment:

"... the right of the people to be secure in their person, houses, papers, and effects, against unreasonable searches and seizures. ..."

Fifth Amendment:

"No person ... shall be compelled in any criminal case to be a witness against himself. ..."

Specific Statutory Provisions Relied Upon

Title 18, United States Code

Section 371:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000.00 or imprisoned not more than five years, or both."

Internal Revenue Code of 1954 (26 U.S.C.)

Section 7602:

"For the purpose of ascertaining the correctness of any return, making a return where none has been

made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax . . . the Secretary or his delegate is authorized—

"(2) To summon the person liable for tax . . . or any person having possession, custody, or care of books of account . . . to appear before the Secretary . . . and to produce such books. . . ."

Section 7604:

"(a) Jurisdiction of District Court.—If any person is summoned under the internal revenue law to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data."

Section 7605:

"(b) Restrictions on Examination of Taxpayer.—No taxpayer shall be subject to unnecessary examinations or investigations. . . ."

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No. 71-1117

In the Supreme Court of the United States

OCTOBER TERM, 1971

RICHARD J. WIDELSKI and MARY C. WIDELSKI,
PETITIONERS

v.

UNITED STATES OF AMERICA and BRUCE B. MACK,
Revenue Agent, Internal Revenue Service

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1971

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RICHARD J. WIDELSKI and MARY C. WIDELSKI,
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v.

UNITED STATES OF AMERICA and BRUCE B. MACK,
Revenue Agent, Internal Revenue Service

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinions of the court of appeals (Pet. 13-20) and of the district court (Pet. 22-27) are not yet officially reported.

JURISDICTION

The judgment of the court of appeals was entered on December 17, 1971. A petition for rehearing was

denied on January 17, 1972 (Pet. 21). The petition for a writ of certiorari was filed on March 2, 1972. Jurisdiction is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether a taxpayer who invokes the privilege against self-incrimination may be compelled to produce copies of his prior tax returns, where criminal prosecution is only a remote possibility and the copies of the returns actually belong to an accountant and were turned over by the accountant to the taxpayer during a tax investigation for the sole purpose of placing them beyond the reach of the investigation.

2. Whether the prosecution met its burden of proof.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourth Amendment, the relevant part of the Fifth Amendment, and Section 7602 of the Internal Revenue Code of 1954 (26 U.S.C.), are printed in the Appendix, *infra*, pp. 13-14.

STATEMENT

The government filed a petition (R. 3-5)[1] in the district court pursuant to Sections 7402(b) and 7604 (a) of the Internal Revenue Code of 1954, seeking

[1] "R." refers to the record appendix filed in the court of appeals.

enforcement of an Internal Revenue Service summons issued under Section 7602 of the Code, requiring petitioners to produce copies of petitioners' federal income tax returns for the years 1949 through 1959 (R. 6-7). The district court ordered petitioners to comply with the summons (Pet. 28). The court of appeals affirmed (Pet. 13-20).

The evidence at the hearing on enforcement of the summons established that an Internal Revenue agent, in the course of investigating petitioners' income tax returns for 1960 through 1966, discovered a possibility of fraud, with the result that a special agent of the Intelligence Division of the Internal Revenue Service was also assigned to the case (Pet. 23). The special agent first saw petitioner Richard Widelski on January 31, 1968, and was told that a Mr. Ted Kustryk (described as an "accountant or bookkeeper" (*ibid.*)) had prepared all of petitioners' returns for 1949 through 1959 (*ibid.*). The special agent immediately made an appointment to see Kustryk on February 8, 1968, but the appointment was later rescheduled for February 12, 1968 (*ibid.*). On the latter date Kustryk told the special agent that two days before (on February 10, 1968) he had turned over to petitioners all work papers and copies of income tax returns pertaining to them (Pet. 23-24). Kustryk had kept all these papers continuously in his possession and petitioners had never previously asked for them (Pet. 24). The court found "that these copies were part of Mr. Kustryk's work papers and remain his property" (*ibid.*).

On May 29, 1969, the summons here involved was served on petitioners, requiring them to produce "[t]he accountant's or taxpayer's [sic] retained copies of Federal Income Tax Returns * * * for the years 1949 through 1959 inclusive, which are in your possession or control" (R. 6). Petitioners refused to comply (R. 4), and the enforcement petition was filed on April 9, 1970 (R. 3).

The summons had been issued because the government no longer had copies of the tax returns in question and the information contained in the returns was necessary for a reconstruction of petitioners' net worth, which in turn would shed light on the accuracy of their tax returns for years 1960-1966 (Pet. 25). In January 1969, the Intelligence Division "decided to drop its portion of the case" (Pet. 24).

The district court concluded that to require petitioners to produce Kustryk's copies of their income tax returns would not violate petitioners' Fifth Amendment rights, "since the frantic last minute efforts on their part to put the requested returns beyond the reach of the Government did not have the effect of transferring rightful possession of Mr. Kustryk's records to them" (Pet. 26).

The court of appeals, affirming, held that the district court's finding concerning ownership of the documents in question was not clearly erroneous (Pet. 18) and that "under the facts of this case" the transfer of the documents to petitioners did not permit them to "raise a privilege that would have been denied to them had the documents remained in the hands of the accountant" (Pet. 19).

ARGUMENT

1. Petitioners' main contentions are premised upon an assertion of the privilege against self-incrimination (Pet. 7-8, 10).[2] Although petitioners fail to explicate their underlying reasoning, their assumption apparently is that the privilege applies (a) to the production of copies of previously filed tax returns, where (b) production of the copies is sought for revenue purposes and the possibility of any criminal prosecution is remote, and (c) the copies belong to a third person and were transferred to the taxpayers for the sole purpose of placing them beyond the reach of a continuing tax investigation. Petitioners' argument fails for three independent reasons.

a. The summons here at issue requires production only of copies of petitioners' tax returns for certain prior taxable years, not of personal financial records or other work papers used in preparing the returns. It is well established that there is no constitutional privilege against filing a tax return. *United States* v. *Sullivan*, 274 U.S. 259. Whether or not under some circumstances there may be a privilege to withhold information requested in a return, the Court in *Sullivan* intimated that any such privilege could

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[2] Petitioners claim to rely in part on the Fourth Amendment, see Pet. 10, but that reliance does not appear to be independent of their Fifth Amendment argument. It follows that if the Fifth Amendment self-incrimination argument is without merit, the reliance on the Fourth Amendment is misplaced.

be asserted only at the time of filing. *Id.* at 263-264. Impliedly, failure to assert the privilege upon the return constitutes a waiver of the privilege with respect to the information reported there, at least insofar as the information is sought by the government only to establish the taxpayer's income for the relevant years. Cf. 26 U.S.C. 7213, relating to penalties for unauthorized disclosure of such information. Therefore, an order requiring production of a mere copy of the return in this setting seeks no privileged information and offers no opportunity for a fresh assertion of the privilege.

This analysis is buttressed by the consideration that under *Sullivan* a tax return is a validly required report to the government. Required reports to the government, like "records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulation" (*Shapiro* v. *United States*, 335 U.S. 1, 33), are quasi-public documents and as such are not subject to an assertion of privilege with respect to the information contained therein. *E.g.*, *Rodgers* v. *United States*, 138 F. 2d 992 (C.A. 6). This is true even when the document is in the possession of the person asserting the privilege. See generally 8 Wigmore, *Evidence* (McNaughton rev. 1961) § 2259c, and Meltzer, *Required Records, the McCarran Act and the Privilege Against Self-Incrimination*, 18 U. Chi. L. Rev. 687, 715-719 (1951). A copy of a quasi-public document should be entitled to no higher privilege than its original.

b. This Court has recently held that "[i]n order to invoke the privilege [against self-incrimination] it is necessary to show that the compelled disclosures will themselves confront the claimant with 'substantial hazards of self-incrimination.'" *California* v. *Byers*, 402 U.S. 424, 429. See also *Marchetti* v. *United States*, 390 U.S. 39, 53. Petitioners do not meet this test. As the court of appeals stated (Pet. 20):

> It is to be emphasized that the District Court in the present case found that the Intelligence Division of the Internal Revenue Service has dropped that portion of the investigation concerned with possible criminal behavior. The case now before us presents an investigation of civil tax liability and perhaps civil fraud penalties. The possibility of any criminal prosecution of the taxpayers would appear to be remote. * * *

This "mere possibility of incrimination" (*Byers*, 402 U.S. at 428) is not a sufficient basis for assertion of the privilege. Indeed, in denying exercise of the privilege in *Byers* the Court noted that the state reporting requirement there was "no more incriminating than the tax return, linked with the disclosure of income, in *United States* v. *Sullivan* * * *." *Id.* at 434. Furthermore, the revenue ends sought to be served here constitute a significant "noncriminal governmental purpose in securing the information * * *." *Id.* at 458 (concurring opinion of Mr. Justice Harlan). Therefore, even if production of the tax returns may involve a slight threat of prosecution, this danger is

outweighed by the legitimate, non-prosecutorial interest of the government in protecting the fisc. The court below was therefore correct in concluding that the petitioners were not entitled to a Fifth Amendment defense in this case.

c. For reasons set forth above, the privilege against self-incrimination is not available to petitioners here.[3] Furthermore, the Fifth Amendment should not protect a nonownership possessory interest acquired during a tax investigation for no other purpose than to achieve an ostensible right to assert the privilege.

It is established that an accountant may be compelled to produce his work papers and other records used in preparing his clients' tax returns. *E.g.*, *Falsone* v. *United States*, 205 F. 2d 734 (C.A. 5). Furthermore, taxpayers may not intervene in enforcement proceedings held to require such production. *Donaldson* v. *United States*, 400 U.S. 517. However; petitioners here contend (Pet. 7-8) that taxpayers, by having their accountant transfer his rec-

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[3] Although the Fifth Amendment claim in this case is similar to that raised in *Couch* v. *United States*, No. 71-889, certiorari granted, April 3, 1972, that case involves not just previous returns but books, records, and papers used in preparing returns and in it the record does not establish that "the Intelligence Division of the Internal Revenue Service has dropped that portion of the investigation concerned with possible criminal behavior" (Pet. App. A, 20). Furthermore, in *Couch* the records concedly were the property of the taxpayer; here, the papers in question have been found to be the property of a third person (Pet. 24). Therefore, it is submitted that the Court need not hold this case for disposition of *Couch*.

ords to them during a tax investigation and then asserting the Fifth Amendment, may defeat an Internal Revenue Service summons through anticipatory self-help. The courts below properly rejected this claim.

In a case involving almost identical facts, the Seventh Circuit categorized the transfer of papers as "a mere attempt to thwart the government investigation," found that the taxpayer's possession therefore was not rightful, and held that the taxpayer acquired no privilege from his possession. *United States* v. *Zakutansky*, 401 F. 2d 68, 72, certiorari denied, 393 U.S. 1021. An assertion of privilege by taxpayers in similar circumstances was also rejected in *Deck* v. *United States*, 339 F. 2d 739 (C.A. D.C.), certiorari denied, 379 U.S. 967.[4] Petitioners rely (Pet. 7) upon a conflict with *United States* v. *Cohen*, 388 F. 2d 464 (C.A. 9), which involved recognition of a Fifth Amendment privilege where an accountant's work papers, correspondence, and other documents were transferred to the taxpayer during a criminal tax investigation. The decision in *Cohen* has not been followed elsewhere and its reasoning has been rejected as unpersuasive. See *United States* v. *Egenberg*, 443 F. 2d 512, 518 (C.A. 3). No sufficient reason appears for reviewing this conflict with a single case, especially since the decision below is sustainable on the entirely separate grounds discussed above.

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[4] Assertion by taxpayers of a privilege against self-incrimination was also rejected in *Bouschor* v. *United States*, 316 F. 2d 451 (C.A. 8), where the taxpayers' attorney had acquired possession of work papers and records.

2. Petitioners further contend (Pet. 11-12) that enforcement of the summons should have been denied because the government allegedly failed to meet its burden of proof, arguing that the district court failed to make findings "on whether all of the required administrative steps in connection with the issuance of a summons had been followed and on whether the original of the desired returns was in the Government's possession" (Pet. 11).[5] Petitioners here are mistaken as to both the law and the facts. "The burden of showing an abuse of the court's process is on the taxpayer * * *." *United States* v. *Powell*, 379 U.S. 48, 58. Petitioners failed to meet this burden; although revenue agents testified in the district court (R. 61-93), petitioners' attorney did not question them concerning any alleged failure to take the "required administrative steps." Furthermore, the district court did quite clearly find that "[t]he Government no longer has in its possession copies of the [petitioners'] income tax returns for the years 1949 through 1959, inclusive" (Pet. 25). This finding was adequately supported by the evidence (R. 69).

---

[5] Petitioners also contend (Pet. 8-10) that the decision should be reviewed because "the Court of Appeals made several pronouncements which are in conflict with established principles applicable to summons enforcement cases" (Pet. 8). However, petitioners do not establish the existence of any such conflict and it is submitted here that there is none. In any event, review would not be warranted on the basis of such *obiter dicta*.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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JOHN M. BRANT,
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APRIL 1972.

APPENDIX

Constitution of the United States:

Amendment IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V.

No person * * * shall be compelled in any criminal case to be a witness against himself * * *.

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 7602. EXAMINATION OF BOOKS AND WITNESSES.

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

(1) To examine any books, papers, records, or other data which may be revelant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer

or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1117

RICHARD J. WIDELSKI and MARY C. WIDELSKI,
Petitioners,

v.

UNITED STATES OF AMERICA AND BRUCE B. MACK, REVENUE AGENT, INTERNAL REVENUE SERVICE,
Respondents.

REPLY BRIEF

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WO. 2-8745—WO. 2-8732

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1117

RICHARD J. WIDELSKI and MARY C. WIDELSKI,
Petitioners,

v.

UNITED STATES OF AMERICA AND BRUCE B. MACK, REVENUE AGENT, INTERNAL REVENUE SERVICE,
Respondents.

REPLY BRIEF

STATEMENT OF THE CASE

The Government's recitation of the facts of this case is drawn primarily from the findings of fact of the two lower courts which in turn are drawn primarily from the findings proposed by the Government in the first instance (Pet. 14-17; 23-25; and R. 1-2).[1] It is also significant in this case that the written opinion of the trial court, embodying all of the Government's proposed findings and conclusions with

[1] "R." refers to the record appendix filed in the court of appeals.

certain minor and meaningless changes, was not entered until October 22, 1970—almost four (4) months after the trial court had decided this matter from the bench (R 2, 44, and 103). In light of this rather unusual situation, it is suggested that if this Court is to be aware of all of the relevant facts of this case so as to be truly aware of the situation presented to it, it must refer to and rely upon our Statement of the case.

ARGUMENT

THE BRIEF FOR THE RESPONDENTS IN OPPOSITION FURTHER DEMONSTRATES WHY CERTIORARI SHOULD BE GRANTED IN THIS CASE.

As a prelude to their arguments and in an obvious attempt to prejudice this Court's thinking on our Petition, the Respondents, on page five (5) of their brief, alleged without the benefit of any evidential foundation that copies of the desired tax returns ". . . . were transferred to the taxpayers for the sole purpose of placing them beyond the reach of a continuing tax investigation". Since, in addition to being prejudicial, the statement is erroneous, it must be commented upon at this time.

When the copy of each of the tax returns for the years 1949 through 1959 was returned to its owners the petitioners—taxpayers on February 10, 1968 the only years under investigation were 1963 through 1966 and it was not for another seven (7) to eight (8) months before any agent of the Internal Revenue Service even became interested in the taxpayers' financial affairs for years prior to 1960 (R. 94-95; 68 and 83). Accordingly, the taxpayers would have required occult powers to have known on, and prior to, that date that: (1) a four (4) year investigation

would be expanded some eight (8) months thereafter to an eighteen (18) year investigation, reaching as far back as 1949; (2) the Government would adopt the absurd position that while they had investigated the taxpayers' affairs for years prior to 1960 they lacked the returns for those years and therefore needed the taxpayers' copies, and (3) the Government would serve a summons for those copies fifteen (15) months after they had been returned to the taxpayers (R. 94-95).

While the Respondents' point regarding the taxpayers' motive is patently ridiculous, it is critical to appreciate why it was made. It was made since it is so prejudicial that one is inclined to dismiss all of the important legal questions involved in this case and simply bend the facts and law so as to arrive at a conclusion favorable to the Government. This of course should not occur.

A. The Government's Argument, that it has the Right to Harass Taxpayers, While Untenable, Demonstrates the Need for a Definitive Statement by This Court on the Matter.

In their brief, the Respondents argued that the Government has the right to harass taxpayers. They did so when they declared, on page six (6) of their brief, that: ". . . an order requiring production of a mere copy of the return in this setting seeks no privileged information and offers no opportunity for a fresh assertion of the privilege."

Under such an hypothesis, the fact that all of the desired information was obtained when the original returns were filed with the Government would be of no import. Additionally, while the argument was made in an attempt

to circumvent the privilege against self-incrimination, there are other consequences. For example, it would logically follow that such "production orders" could be entered each day of the year and the taxpayer would have to comply. *Contra,* 26 U.S.C. §7605(b).

Furthermore, the argument overlooks the fact that administrative summonses may not be used to obtain information already within the Government's possession. *United States v. Powell,* 379 U.S. 48, 57-58 (1964) and 26 U.S.C. §7602. In fact, an attempt to secure, through an administrative summons, information already within the Government's possession, would constitute an attempt to abuse the process of the court and would therefore have to be dismissed. *United States v. Powell, supra; Donaldson v. United States,* 400 U.S. 517 (1971) and 1 Davis, Administrative Law, §3.12 (1958). Since in this case, the original returns were filed with the Government, and in light of the absence of a finding or even of any evidence of record that the *original* returns are not still within the Government's possession, it is clear that this latest argument must be rejected.

Furthermore, as summons enforcement cases cannot be used as vehicles to obtain redundant information, such as, copies of filed tax returns, the Respondents' argument that such copies are not covered by the privilege against self-incrimination is moot insofar as this case is concerned. For the same reason, the "required records" portion of their argument is moot. Additionally, it is not even applicable in this case. While 26 U.S.C. §6001 requires the retention of certain records, there is no law which requires taxpayers to file with the Government, or to keep the only documents being sought in this case—copies of Federal income tax *returns.* (R. 6-7) *Cf.* 26 U.S.C. §6001; Reg. §§1.6001-1(a); 31.6001-1 (b); 31.6001-5 (a) (6)-(9). Accordingly, pursuant to the Respondents' logic, the copies are not

quasi-public documents and as such are protected in this setting by the Fourth Amendment, and otherwise, by the Fifth Amendment. *Boyd v. United States,* 116 U.S. 616, 635 (1886).

While the Respondents' argument is moot, it should still be commented on due to the threat it poses to the Fifth Amendment. In making this argument the Respondents on page six (6) of their brief proclaimed that:

> "[i] impliedly, failure to assert the privilege upon the return constitutes a waiver of the privilege with respect to the information reported there, *at least insofar as the information is sought by the government only to establish the taxpayer's income for the relevant years.*"

The italicized portion of the quote is troubling for a multiple of reasons. First, it implies that an argument has been made by us to the effect that the privilege against self-incrimination is applicable in civil cases where there is no threat of criminal prosecution. No such argument has been made. Second, it gives the impression that there is no threat to the taxpayers of federal prosecution which would be based in part upon the desired information. Real threats do in fact exist as even the Court of Appeals recognized. (Pet. 20). Third, it gives the impression that the taxpayers have been granted immunity. Such is not the case and even if it were, the grant of immunity would have to come from all three taxing authorities—the City, State and Federal Governments. *Counselman* v. *Hitchcock,* 142 U.S. 547 (1892) and *Murphy* v. *Waterford Comm'n. of New York Harbor,* 378 U.S. 52 (1964). Only by reviewing this case can the Court remove this latest threat to the ambit of protection afforded by the Fifth Amendment.

B. Despite the Agreement Between the Respondents and the Court of Appeals for the Sixth Circuit that a New and More Restrictive Standard is to be Applied in this Type of Case, the Standard Prescribed by This Court is Still the Law.

Apparently, recognizing the fact that if the normal standard were applied in this case, or possibly as part of its continual assault upon the Fifth Amendment, the Government argued that the standard which has evolved in "failure to file" cases such as *Marchetti* v. *United States*, 390 U.S. 39 (1968); *United States* v. *Sullivan*, 274 U.S. 259 (1927), and *Rodgers v. United States*, 138 F.2d 992 (6th Cir. 1943) or in a "failure to stop and disclose" case such as *California* v. *Byers*, 402 U.S. 424 (1971) should be applied in this case. However, the decisions rendered in those cases have no bearing on the present controversy.

In this matter, there is no statute, regulatory or otherwise, that requires the taxpayers to file copies of tax returns with the Government. Furthermore, the public at large is not involved. Rather, we are in the midst of a tax investigation and it is directed against the two (2) taxpayers in question. Just those few facts alone so distinguish this case from the cited authorities that the rationale of the latter simply cannot be held to be applicable herein.

Nevertheless: since (a) the taxpayers have already been "found guilty" by the Government of income tax evasion;[2] (b) a Special Agent is still involved in this case (R. 77 &

[2] The civil fraud penalty has been asserted by the Internal Revenue Service for the years 1960 through 1966 pursuant to 26 U.S.C. §6653 (b). (Pet. 24).

79);[3] (c) the criminal case was only "dropped" due to certain deficiencies in it at certain points (R. 62, 76, 77, 79 & 84), and (d) there is no reason why it cannot be reopened at any time, we would suggest that even under the "statutory" standard, it is clear that a compelled disclosure in this case would confront the taxpayers with substantial hazards of self-incrimination.

In any event, it would appear to be clear that a compelled disclosure could be injurious in the sense of tending to incriminate the taxpayers in this case and therefore unnecessary under the true standard applicable in cases of this sort. *Malloy* v. *Hogan*, 378 U.S. 1, 13 (1964); *Hoffman* v. *United States*, 341 U.S.479, 486-487, 488 (1951); *Blau* v. *United States*, 340 U.S. 159 (1950); *United States* v. *Vadner*, 119 F. Supp. 330 (E.D. Pa. 1954), and *In Re Friedman*, 104 F. Supp. 419 (S.D.N.Y. 1952). Accordingly, since the new standard employed by the Court of Appeals is not applicable in cases of this type, a conflict exists and should be resolved by this Court. Furthermore, this new standard completely overlooks the fact, as explained on page ten (10) of our Petition, that a compelled production of the copies would result in a violation of the Fourth Amendment.

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[3] Special Agents are members of the Internal Revenue Service's Intelligence Division which "enforces the criminal statutes . . . by developing information concerning alleged criminal violations thereof . . ." Internal Revenue Service Organization and Functions ¶1118.6, 35 Fed. Reg. 2454.

C. The Conflict in Legal Principle Which Exists, as Recognized by Both Parties to This Controversy, Between the Sixth and Ninth Circuits Should be Resolved by This Court.

While the Respondents erroneously alleged that the decision below is sustainable on other grounds, they did admit that a conflict exists between the decision of the Court of Appeals in this case and with *United States* v. *Cohen*, 388 F.2d 464 (9th Cir. 1967). However, they argued that since the conflict is with a single case there is no reason for review by this Court.

There is of course no requirement for a multiple conflict before certiorari will be granted. U.S. Supreme Court Rule 19. Additionally, as noted in our Petition, there are three other compelling reasons why this case should be reviewed. Furthermore, the conflict in this case is not narrowly confined and is apt to have continuing future consequences. Simply stated, if this conflict is permitted to continue, the basis required in order to claim the Fifth Amendment will be far less in the Ninth than in the Sixth Circuit and accordingly the Constitutional protection afforded those citizens will be uneven. This situation should be corrected immediately and this Court is the only entity which can do so.

D. In Light of This Court's Recent Action, This Case Should be held in Abeyance Temporarily.

As noted by the Respondents on page eight (8) of their brief, this Court on April 3, 1972 granted certiorari in the case of *Couch* v. *United States,* No. 71-889. While the Respondents attempted to distinguish this case from the *Couch* case on a factual basis,[4] their only real achievement was to draw attention to the fact that in both of these cases, there are at least two (2) common propositions in issue. First, possession, and not ownership, is the key to the question of whether desired records are within an individual's privilege against self-incrimination. Second, a compulsory production of an individual's records through an order of a court can breach an individual's rights, from unreasonable searches and seizures, under the Fourth Amendment of the Federal Constitution. In light of those two (2) common issues, it is clear that this case should be held for the disposition of the *Couch* case.

Again, in an attempt to prejudice this Court against the taxpayers, the Government in effect argued that the taxpayers had attempted to increase the ambit of protection afforded by the privilege by acquiring the copies of the returns for 1949 through 1959 during a tax investigation of 1963 through 1966. In point of fact, the taxpayers could have successfully raised their Fourth and Fifth Amendment rights even if the copies had continued in the nominal[5] possession of their bookkeeper since they were al-

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[4] The fact that the Intelligence Division "dropped" its portion of the Widelski case is meaningless since there is absolutely nothing to prevent it from reactivating its case for the same years or for later years. *See United States* v. *Blue,* 384 U.S. 251 (1966); *Bouschor* v. *United States,* 316 F.2d 451 (8th Cir. 1963), and Pet. 5.

[5] The bookkeeper only had nominal possession since he was to hold the copy of each return for security purposes pursuant to the 1949 contractual, albeit verbal, arrangement entered into by the parties when the bookkeeper was first engaged by the taxpayers (R. 99).

ways in control of the copies. See: *Stuart* v. *United States*, 416 F.2d 459 (5th Cir. 1969); *In Re Grant*, 198 F. 708 (S.D. N.Y. 1912), and *Hinchcliff* v. *Clarke*, 371 F.2d 697 (6th Cir. 1967), certiorari denied, 387 U.S. 941 (1967). Consequently while the Government would have this Court believe that the taxpayers are attempting to enlargen the protection afforded by the Fifth Amendment, the Government is in fact attempting to diminish it.

Furthermore, the Government was in error when it alleged that the taxpayers lacked the proprietary interest so as to have, in the appropriate hypothetical case, the required basis on which to intervene. *See: Donaldson* v. *United States, supra.* In this case, the record clearly establishes that the taxpayers were the actual owners of the copies (R. 99-101). Hence, the proprietary interest requirement would be met in every instance (R. 99-101).

In a further attempt to prejudice our case, the Government was so bold as to allege that the facts of this case were "almost identical" with those of *United States* v. *Zakutansky*, 401 F. 2d 68, 72, (7th Cir. 1968), certiorari denied, 393 U.S. 1021 (1969). The allegation is incredulous since in the *Zakutansky* case: (1) the certified public accountant transferred the papers to the taxpayer only after having been served with two (2) subpoenas for them; (2) when first asked about the papers, the certified public accountant stated that they belonged to him, and (3) the papers sought by the Government pertained to the years then under investigation. None of those critical facts are present in this case.

Contrary to the Government's statement, the facts are so dissimilar in the two (2) cases that we have cited the *Zakutansky* case as authority for the proposition that a sufficient basis, separate and apart from ownership, to

claim that the copies are within the privilege is rightful and indefinite possession. For the same reason, we have also cited the case of *Deck* v. *United States*, 339 F.2d 739 (C.A.D.C. 1964) certiorari denied, 379 U.S. 967 (1965) where state law prescribed that the involved registered public accountant owned the records in question and where he had demanded their return prior to the time summonses had been served.[6]

[6] While the Government also cited the case of *Bouschor* v. *United States*, *supra*, it is not at all applicable in this case since the issue there was whether an attorney had the right to assert the privilege on behalf of his clients.

CONCLUSION

After reviewing the Petition and Briefs, it becomes apparent that the review of this case by this Court will serve a multiple of purposes. First, it will eliminate the conflict which now exists between the Sixth and Ninth Circuits. Second, it will re-establish which standard is applicable in determining whether a claim of the privilege against self-incrimination was justifiable. Third, it will solidify certain of the legal principles put into doubt by the decision of the Sixth Circuit. Fourth, and finally, it will reassert the fact that summons enforcement cases are adversary proceedings which can be of vital importance, and for that reason, must be handled accordingly by the lower courts which must be ever vigilant to protect the rights of the individual citizens.

For those reasons, the petition for a writ of certiorari should be granted.

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APPENDIX

Internal Revenue Code of 1954 (26 U.S.C.):

SECTION 6001. NOTICE OF REGULATIONS REQUIRING RECORDS, STATEMENTS, AND SPECIAL RETURNS.

Every person liable for any tax imposed by this title, or for the collection thereof, shall keep such records, render such statements, make such returns and comply with such rules and regulations as the Secretary or his delegate may from time to time prescribe. Whenever in the judgment of the Secretary or his delegate it is necessary, he may require any person, by notice served upon such person or by regulations, to make such returns, render such statements, or keep such records, as the Secretary or his delegate deems sufficient to show whether or not such person is liable for tax under this title.

REGULATION SECTION 1.6001-1. RECORDS.

(a) IN GENERAL. Except as provided in paragraph (b) of this section, any person subject to tax under subtitle A of the Code, or any person required to file a return of information with respect to income, shall keep such permanent books of account or records, including inventories, as are sufficient to establish the amount of gross income, deductions, credits, or other matters required to be shown by such person in any return of such tax or information.

REGULATION SECTION 31.6001-1. RECORDS IN GENERAL.

(b) COPIES OF RETURNS, SCHEDULES, AND STATEMENTS. Every person who is required by the

regulations in this part or by instructions applicable to any form prescribed thereunder, to keep any copy of any return, schedule, statement, or other document, shall keep such copy as a part of his records.

REGULATION SECTION 31.6001-5. ADDITIONAL RECORDS IN CONNECTION WITH COLLECTION OF INCOME TAX AT SOURCE ON WAGES.

(a) Every employer required under section 3402 to deduct and withhold income tax upon the wages of employees shall keep records of all remuneration paid to (including tips reported by) such employees. Such records shall show with respect to each employee—

* * * * *

(6) Copies of any statements furnished by the employee pursuant to paragraph (b)(12) of §31.3401 (a-1) (relating to permanent residents of the Virgin Islands).

(7) Copies of any statements furnished by the employee pursuant to §§31.3401 (a) (6)-1 and 31.3401 (a) (7)-1, relating to nonresident alien individuals.

(8) Copies of any statements furnished by the employee pursuant to §31.3401 (a) (8) (A)-1 (relating to residence or physical presence in a foreign country).

(9) Copies of any statements furnished by the employee pursuant to §31.3401 (a) (8) (C)-1 (relating to citizens resident in Puerto Rico).